

**STATE OF NEW JERSEY  
DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF ALCOHOLIC BEVERAGE CONTROL**

IN THE MATTER OF WHOLESALER	)	
PROVISION OF SERVICES TO	)	SPECIAL RULING
RETAILERS OF ALCOHOLIC	)	
BEVERAGES	)	
_____	)	

BY THE DIRECTOR:

The purpose of this Special Ruling is to address certain practices involving the provision of services, facilities or equipment by industry members in the manufacturing and wholesaling tiers to retail licensees. Some of these practices were discussed and previously authorized by Directors Lerner and Vassallo, in ABC Bulletin 2421, Items 7 and 8 (dated November 24, 1981) and ABC Bulletin 2437, Item 6 (dated December 27, 1984), respectively. However, the subject of those bulletins was limited to practices involving the shelving and resetting of alcoholic beverage products by wholesale licensees, through their solicitors and display companies, on retail licensed premises, commonly referred to as "packing out." For the reasons stated herein, this Special Ruling is expanded in scope to provide guidance to the industry on the extent to which other services and things of value can be provided to retailers, as well as limitations on packing out.

Noting that current practices involving packing out appeared to be evolving far beyond those envisioned by Directors Lerner and Vassallo and they further appeared to be spiraling to even greater levels, in my prior Special Ruling on this subject dated April 4, 2003, I determined to prohibit the practices previously authorized, effective June 9, 2003. My concern, which has increased with the passage of time and subsequent analysis and comment by the industry, is that if these practices continue in their present unrestrained manner, I believe that they will create dangerous precedents within the industry regarding disproportionate services and tied-house violations. Ultimately, if left unchecked, they may also lead to such prohibited practices as slotting fees, wholesale advertising for retail licensees and exclusive outlets.

After giving consideration to industry comments and recommendations of the ABC Advisory Committee, I amended my prior ruling on May 1, 2003 to provide that restrictions on packing out would not become effective until 30 days after issuance of an amended ruling. However, due to my concern with the evolving practices, I cautioned that any changes in the practice of packing out implemented since my April 4, 2003 Special Ruling would not be accorded any deference as a pre-existing practice of the industry. Subsequent Special Rulings, on August 4, 2003, August 8, 2003 and October 7, 2003, reiterated my intent to develop regulations covering this subject and provided interim guidance on industry practices.

The Alcoholic Beverage Control Act strictly prohibits vertical integration of alcoholic beverage sales at the wholesale and retail levels in New Jersey. The purpose of this absolute prohibition on tied practices has been to avoid the development of situations like those that existed prior to Prohibition, where wholesalers and suppliers essentially controlled retail accounts, but were not legally liable for the problems that occurred at the local retail licensed premises. In addition, the tied-house statute prohibits retailers from gaining control or influence in the wholesaling of products and services offered by wholesalers. Thus, retailers are not permitted to demand services, either in the form of money, free advertising or labor, to accomplish tasks that are solely their responsibility. Examples of these tasks are decisions on pricing, advertising or the placement of products and servicing equipment within a retail licensed premises. If a retailer were able to demand and receive such services, it could sell alcoholic beverages at cheaper prices than its competitors, since it would not have to bear equivalent operating costs.

Conceptually, absent statutory or regulatory provisions to the contrary, any assistance provided by wholesalers to retailers can be deemed to be a violation of the tied-house statute, N.J.S.A. 33:1-43. However, in a series of published opinions, the then-Directors identified certain practices that were deemed to be de minimis and, therefore, permitted. In ABC Bulletin 2421, Item 7 (dated November 24, 1981), Director Lerner addressed the servicing of retail accounts by wholesalers. He stated that shelf stocking, brand rotation and the dusting and cleaning of shelves were permitted. He specifically stated that touching a competitor's product during permitted activities and moving merchandise from storage to display or shelf areas were not prohibited. Price marking was prohibited, even if it was done under a retailer's direction. All provided services had to be contained in a wholesaler's Marketing Manual, available on proportionally equal terms to all retailers and could not be tied to the future purchase of product.

In ABC Bulletin 2421, Item 8 (dated November 24, 1981), Director Lerner addressed the servicing of retail accounts by solicitors. He referred to N.J.A.C. 13:2-24.2(a)(2), which provides that such services must be available on proportionally equal terms to all retailers competing in the sale of the product or products involved and that the services may not be contingent on an agreement to make future purchases. He further stated that this regulation recognizes that more services can be provided to retailers who buy more of the product or products in question.

Examples of permitted services include, but are not limited to, developing product promotion, working with advertising and display material, educational programs concerning marketing and stocking and product rotation. Examples of prohibited services include involvement in retailer-to-consumer pricing or shelf pricing or labeling of products, even if the prices are fixed by the retailer, and certain deliveries by a solicitor to a retailer.

In ABC Bulletin 2437, Item 6 (dated December 27, 1984), Director Vassallo reflected on the retail pricing prohibitions in the two earlier bulletins. He concluded that they were identified to address concerns that wholesalers and/or suppliers would establish retail sales prices or impede retail competitive pricing after deregulation. Noting that competitive pricing had

developed in the years since deregulation, he decided to modify certain of the prohibitions and to allow certain pricing assistance to be given to a retailer by a wholesaler, as long as the retail price was established by the retailer and the retail licensee affirmatively requested the assistance.

Director Vassallo stated that such changes would be closely monitored and that the other services addressed in Director Lerner's bulletins would remain the same, with one clarification. Under no circumstances may sales staff engage in the practice of "resetting stores," that is, permitted activities may only encompass the wholesaler or sales staff's own product or products and not those of competitors. Although a competitor's products may be touched or removed temporarily during dusting, cleaning or stocking, they must be returned to the same location when these tasks were completed.

A fundamental underpinning of the prior bulletins by Directors Lerner and Vassallo is the recognition that permitting yet limiting such practices involves balancing industry desires to "add value" to the products sold to retailers while maintaining the strict separation of the tiers provided for in the Alcoholic Beverage Control Act. As market and competitive forces shift focus and emphasize new practices or services, the Division must necessarily re-evaluate prior policies in light of the changing marketplace.

At the beginning of the deregulation era when these bulletins were promulgated, there were almost 12,000 retail licenses in the State. In 2002, there were approximately 9,500 retail licenses, which demonstrates a drop of about 20 percent since 1979. In addition, the number of wholesale licenses has dropped dramatically since 1980, due to mergers and business failures. However, while there are fewer retailers and wholesalers, there has been an increase in the number and types of alcoholic beverages available. Presently, there are approximately 41,800 brands registered with the Division. Thus, there is strong competition for sales to fewer retail licensees. Even more importantly, there is strong competition by wholesalers for the most prominent display of products in shelving and floor areas of retail distribution licensed premises and to be the featured beverage of choice in taverns and restaurants.

In the last ten years, large plenary retail distribution licensees have developed, which seek to offer the widest variety of alcoholic beverages to the New Jersey consumer at the most competitive prices. The goal of these retail licensees is to move their products in volume. Thus, wholesaler competition for floor and shelf space is significant. As a result, the Division has seen practices where wholesalers, in order to gain the most and premium floor space, offer their solicitors or display companies to retail licensees to meet the delivery of their products and to move them to designated areas. This is similar to the practices of wholesalers of snack foods, soda and bread. Likewise, certain plenary consumption licensees may demand or receive services or equipment relating to advertising or dispensing of alcoholic beverages, thus avoiding labor and other costs involved in the operation of a retail business.

These services by wholesalers, when done on a regular and continuous basis, offer a significant labor savings for the retailers involved and could alter the entire marketing and

pricing structure. Over time, some of these practices have changed from a de minimus servicing of retail accounts to "mandatory" assistance required by retail licensees in order for the retailers to maintain their profit margins and sales.

The scope and nature of the current practices cause several major concerns to the Division. Suppliers and wholesalers, through their employees, solicitors, display companies, and others, are providing labor, employees and other items of value to retail licensees in the form of equipment, services and advertising to maintain retail exposure and floor space for the wholesalers' products. In some cases, these practices are so extreme that they violate the tied-house statute. The converse is also possible, where a retailer may become so dependent upon a wholesaler's labor that the retailer would be required to purchase the vast majority of its products from that wholesaler in order to maintain its competitive level. Therefore, the cost of the labor and provision of other services becomes part of the equation in determining what products to buy.

Mindful of the concerns already expressed herein and the statutory mandate to maintain separation of the industry tiers, the Division developed proposed regulations in the Spring of 2004 that were presented to the ABC Advisory Committee and other interested members of the industry. The proposed regulations were comprehensive and sought to address a number of industry practices beyond those described in the older "packing out" bulletins. The proposed regulations were intended to govern or restrict a number of services provided to retailers, from supplying labor in the form of packing out and other services, to provision of marketing items and incidentals.

While specific provisions of the regulatory proposals received support from the industry, it became apparent from discussions at the ABC Advisory Committee meetings on March 30 and May 11, 2004, and from subsequent industry comments, that the proposal was generally considered overbroad and would negatively impact existing industry practices. The concerns expressed by commentators reflect the difficulty of striking a balance between the competitive goals of wholesalers and suppliers to aggressively market and provide "added value" to their products and my statutory mandate to foster the beneficial aspects of competition while maintaining independent industry tiers.

Retailer independence and a level playing field not dominated by a particular tier or group of licensees are crucial to retaining small businesses that are answerable to consumers and licensing authorities. While recognizing industry concerns on competition and marketing, I am equally mindful of my responsibility to maintain a statutory and regulatory structure that has served the industry, the public and the State so well for a number of years. The foundation of this structure is the concept, as viable today as it was over 70 years ago, that the marketing of alcohol is unique and requires strict controls not essential for other products.

Accordingly, I have presented the Advisory Committee and other interested industry members with a revised regulatory proposal for consideration. This proposal, insofar as possible,

seeks to harmonize existing industry practices and the developing competitive marketplace with my previously articulated concerns, to maintain the protection afforded by the statutory structure. Comments on this proposal were to be submitted to the Division on or before August 30, 2004. Given the number of discussions and previously submitted comments over the lengthy period this subject has been reviewed, I believe that it is appropriate and necessary that I act quickly to provide guidance to the industry during the interim period, prior to formal adoption of regulations.

Therefore, consistent with my revised proposed regulations, the following conditions are imposed on the provision of services, equipment and facilities to retailers. These conditions are in addition to and supplement existing statutory and regulatory requirements, particularly the provision of N.J.A.C. 13:2-24.2 requiring same to be offered to the retail trade on a proportionally equal basis and without the requirement of a future purchase. For clarity, I have restated several portions of the existing regulations in order to provide context for the new conditions imposed. As stated in my prior ruling, to provide time for the industry to make any necessary adjustments in existing practices, I shall provide 30 days before the following provisions become effective. Thus, these provisions will be effective on October 1, 2004. In addition, I recognize from recent comments I have received that there may arise minor interpretive issues, which do not rise to the level of alteration of the conditions as I have proposed them, but may require consideration in the future. If such situations arise, I expect to receive comments and suggestions regarding them.

#### I. DISCRIMINATION IN SERVICES, FACILITIES OR EQUIPMENT

Services, facilities and equipment offered to retail licensees are subject to the following additional conditions:

- A. All services, facilities and equipment that will be offered to retail licensees must be available to all customers or accounts competing in the distribution of the connected alcoholic beverage product on proportionally equal terms and described in the Marketing Manual of the entity making the offer. The Marketing Manual description shall include the category of the item offered, the frequency of offers, how retailers will be advised of offers and a general plan, subject to review by the Director, describing how such offers will be made to retailers on a proportionally equal basis.
- B. No services, facilities or equipment may be offered to retail licensee which, directly or indirectly, requires the future purchase or an agreement to make a future purchase of any alcoholic beverages.
- C. Offers of services, facilities or equipment not used by the retail licensee to promote brands in the retail business, including sporting event tickets, vacation packages or the like, are limited to no more than an aggregate fair market value of \$500.00 annually per retail licensee.

D. The following services, facilities and equipment are subject to additional limitations:

1. Delivery, as limited by Section A of Part III below;
2. Product rotation, as limited by Section B of Part III below;
3. Shelf management, marketing and pricing, as limited by Section C of Part III below;
4. Displays, as described in Section D of Part III below; and
5. Tap, line cleaning and dispensing equipment, as limited by Section E of Part III below.

## II. DISPLAY SERVICES AND MERCHANDISERS

A. No licensee, permittee, or registrant privileged to engage in the commerce of alcoholic beverages in this State shall, directly or indirectly, furnish to, provide payment for, receive or accept anything of value from, or otherwise utilize in any manner whatsoever, any display service unless such service has registered with the Division in a form prescribed by the Director. Such registration shall include:

1. The name and address of the display service and all officers, directors, partners, stockholders and/or employees thereof, unless a publicly traded corporation, in which case only officers, directors and stockholders having at least one percent interest need be furnished;
2. An affidavit or certification that no person listed in 1. above would be disqualified from having an interest in an alcoholic beverage license in this State;
3. Copies of all existing display service agreements with licensees, permittees, registrants, suppliers, importers, manufacturers or cooperatives doing business in the State of New Jersey, which agreements must be in writing; and
4. The issuance of a registration acknowledgment, which shall be renewable on May 1 of each year.

B. Every licensee, permittee or registrant privileged to engage in the commerce of alcoholic beverages in this State shall maintain on its licensed premises all written agreements and detailed records of all transactions with any display service for a period of three years.

- C. "Display service" shall include any person or persons who are performing services on a retail licensed premises relating to the building of displays, display maintenance and merchandising and who are not
1. being paid by the retail licensee; or
  2. employed by the licensee, permittee or registrant providing payment for such services.
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- D. No display service registrant shall provide any services to any retail licensee in which an immediate family member of the display service registrant has any direct or indirect financial interest or participates in the operation of the retail licensee.
- E. The term immediate family member as used in this subchapter means husband, wife, son, daughter, grandson, granddaughter, brother, sister, father, mother, brother-in-law, sister-in-law, father-in-law, mother-in-law, son-in-law, or daughter-in-law.
- F. The registration of a display service may be suspended or revoked by the Director for any violation of the Alcoholic Beverage Control Act or the regulations promulgated thereunder.

### III. DELIVERY, PRODUCT ROTATION AND SHELF MANAGEMENT

Licensees and other persons described in N.J.A.C. 13:2-24.2(a), except retail licensees, shall not, through employees or third parties, rotate products, stock shelves or otherwise move alcoholic beverage products on retail licensed premises, except as provided below.

- A. Delivery of alcoholic beverages to retail licensed premises is permitted by licensees authorized to do so by statute and regulation in the normal course of business.
1. Delivery shall be made to not more than three locations on a retail licensed premises, except that malt beverages and other products requiring cold storage may be delivered to an additional cold storage location.
  2. Delivery shall not include unpacking boxes or cases into individual units for retail sale.
  3. Delivery personnel may deliver products into areas of a retail licensed premises accessible to consumers, but shall not place or stack cases on shelves.
- B. Product rotation is only permitted when performed to insure product freshness for limited shelf life products and products with labels or codes nearing expiration or to remove distressed product.

1. Rotation may be performed only for the licensee's own products. A competitor's products may not be touched or arranged in any manner.
2. Rotation does not include any of the following:
  - i. Opening of cases or placement of individual bottles on shelves.
  - ii. Movement of products from one shelf location to another.
  - iii. Rearrangement of products in sales or storage areas in less than case lots.

C. Shelf management, marketing and pricing may be discussed with a retail licensee. Implementation of a shelf management plan, a "reset," may be performed by a licensee or employee, as described in N.J.S.A. 13:2-24.2(a), no more than twice annually, at the direction of a retailer. Otherwise, implementation of suggested shelf management plans shall be done solely by the retail licensee and its employees.

1. Marketing data, suggested retail pricing and the like may be supplied in the general format used by the provider.
2. Physical pricing of products for retail sale is prohibited by anyone other than the retail licensee and its employees. The furnishing and placement of price signs and banners to support displays and special sales by the retailer are permitted at the retailer's request.
3. Only the retail licensee and its employees and its contractors, such as accountants and bookkeepers, may enter marketing, pricing cost or shelf management programs and data into electronic systems owned, maintained, used or operated by the retail licensee.

D. Subject to the limitations set forth herein, displays may be installed and maintained on retail licensed premises at the retailer's discretion.

1. Displays, including product displays, may include racks, bins, barrels, casks, shelving and similar items, the primary function of which is to hold, shelve, or display product.
  - i. Displays shall have three to four sides visible to consumers on the retail licensed premises. Except for "end cap" displays, aisles on the premises shall not be considered a display under this section.

ii. Displays may include alcoholic beverage products, point of sale consumer items and prizes or awards intended for consumers, as set forth in 2 below.

2. Consumer prizes or "featured items," also known as "dealer loaders," may be used in a display, provided that:

i. The value of the item(s) shall not exceed \$300.00.

ii. The display items shall be awarded to a consumer unrelated to the retail licensee or family member described in Section E of Part II above or its employees as a prize, or returned to the display provider.

iii. The retail licensee shall maintain a record of the name, address, date of birth and driver's license number of the consumer receiving the award. The retail licensee shall maintain this information for one year.

3. Building and maintenance of displays may be performed by retail licensees and their employees and other licensees described in N.J.A.C. 13:2-24.2(a), as well as display services conforming to the requirements of N.J.A.C. 13:2-24.12, as modified by Part II above.

E. Tap, line cleaning and dispensing equipment:

1. Except as otherwise noted in paragraph 2 below, the purchase, maintenance and repair of equipment used in furtherance of the licensed business is the responsibility of the licensee at whose licensed premises the equipment is being used.

2. Certain equipment used at retail licensed premises involves the dispensing to customers of alcoholic beverages products. These include, but are not limited to, drafting systems for malt alcoholic beverages, powered decanter systems for wine and pouring systems, decanter racks or blending machines for distilled spirits. Because the quality of the branded product may be affected by equipment performance, and subject to the general requirements of this subchapter, another industry licensee may give, loan or sell the following equipment to the retail licensee or furnish the following service:

i. Tap markers or labels indicating the brand of alcoholic beverages being dispensed, as required by N.J.A.C. 13:2-23.22;

ii. Branded or unique glassware, as referenced in N.J.A.C. 13:2-23.16, and other glassware, cups or dispensers as may be otherwise offered to retail licensees, consistent with the general requirements of N.J.A.C. 13:2-24.2

iii. Temporary use of dispensing equipment for purposes of special events, social affair permittee's events, events at temporarily licensed premises, and tapping equipment to be made available to retail licensees for their customers purchasing draft alcoholic beverages; and

iv. Emergency coil cleaning services and repairs to tapping equipment and pressure systems at retail licensed premises when the retail licensee's usual service is not available, not to exceed three times annually, only to rectify specific concerns regarding product taste, quality or to refresh draught lines when a different brand of alcoholic beverage is introduced into the system.

#### IV. PENALTIES

The Director may suspend or revoke any license, permit or registration held by any manufacturer, supplier, importer, brand registrant, wholesaler, distributor, retailer or display service that violates, or aids and assists in any violation of this Special Ruling.

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JERRY FISCHER  
DIRECTOR

DATED: August 31, 2004